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No. 92-1589

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

EXXON SHIPPING COMPANY,
Petitioner,

v.

THEODORE M. ELLENWOOD and ANN M. ELLENWOOD,
Respondents,

and

STATE OF MAINE,
Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Respondents' opposition to the petition for a writ of certiorari discounts the disruption the First Circuit's decision poses to the maritime industry. As a result, respondents dismiss the importance of this case to an industry critical to the national interest. Respondents also ignore the impact of Supreme Court precedent holding that where no particular state has a significant interest in a maritime dispute, there is no "local but maritime" rationale to apply state law and undermine the uniformity of admiralty law.

In addition, analysis of *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983), shows that the Eleventh

Circuit—in conflict with the First Circuit—has held that Congress intended to require uniform standards of conduct in the area of handicap discrimination for federal contractors. Respondents' efforts to distingiush the two cases are off point.

Finally, Ellenwood unabashedly distorts the trial record in contending that his contract claims were based on something other than an employee substance abuse policy. Such distortions may not avoid the question for which review is sought: should maritime law recognize an exception to the at-will employment doctrine based on representations contained in an employee policy statement.

I. THE FIRST CIRCUIT APPLICATION OF STATE HANDICAP DISCRIMINATION LAWS TO MARITIME EMPLOYMENT SHOULD BE REVIEWED BY THE COURT

A. Both the State and Ellenwood Misconstrue the Disruptive Effect the First Circuit's Decision Will Have on the Maritime Industry

Both the State of Maine (the "State") and Theodore and Ann Ellenwood ("Ellenwood") misconstrue the disruptive effect the First Circuit's decision will have on the maritime industry. For its part, the State contends that the Americans With Disabilities Act (the "ADA"), 42 U.S.C. § 12101 *et seq.*, somehow "totally undercuts" concerns about inconsistent and uncertain standards governing handicap discrimination in maritime employment. *See* State of Maine's Brief in Opposition at 5 ("State Br."). From that proposition, the State argues that this case is no longer important to the maritime industry. *Id.* But enforcement of a federal statute, be it the ADA or the Rehabilitation Act of 1973, § 503, 29 U.S.C. § 793, is enforcement of a single standard of conduct, not enforcement of up to 50 disparate standards of conduct. The fact that the ADA does not, by its terms, preempt state discrimination laws is irrelevant to

the issue posed by the decision of the First Circuit: is there a need to disrupt the harmony of admiralty by requiring maritime enforcement of various state handicap discrimination statutes.[1]

Both the State and Ellenwood wrongly argue that choice of law rules will immunize maritime employers from inconsistent application of state laws. *See* Ellenwood Br. at 14 n.9, 17-18; State Br. at 7 n.3. It may well be true that, under the First Circuit decision, an individual seaman may recover under only one state handicap discrimination law on a given claim. But years into this litigation it is still undecided as to which of the state statutes alleged by Ellenwood (Maine, New Jersey or Texas) apply, and the First Circuit decision guarantees such uncertainty will become an abiding characteristic of maritime law. Choice of law principles offer no relief to the maritime employer.

Factors applied in any given interest analysis will differ among crew members on board a single ship. A crew will consist of residents of many different states; hiring locations will vary; crew members will sail on different voyages at different times. For each crew member on board a ship a different result may well flow from the application of conflict rules, even to the extent that such

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[1] Ellenwood asserts that state handicap discrimination laws "already play a large role" in the development of rules of conduct for employers under federal handicap discrimination statutes. Ellenwood Brief in Opposition at 15-16 ("Ellenwood Br."). From this truism, Ellenwood argues that application of 50 state laws will pose no danger to the harmony and uniformity of maritime law. *Id.* Of course, it is one thing to apply the amalgam of laws derived from various sources to create a single comprehensive federal standard governing handicap discrimination. It is something else to apply each of those differing sources of law to specific disputes.

It *is* relevant that the ADA and the Rehabilitation Act already protect seamen from handicap discrimination—without any injury to maritime uniformity. Contrary to Ellenwood's argument, Ellenwood Br. at 18, there is no practical or humanitarian need to extend that protection by application of disparate state laws.

rules are themselves uniform. The maritime employer will face the regulatory nightmare of complying with inconsistent handicap discrimination standards and procedures on board a single ship. *See* Petition for Certiorari at 10-14. This illustrates what makes the maritime industry different from land-based industries. On land, even a multi-national employer usually will face common obligations to employees at a single plant. Choice of law rules do not, by any measure, lessen the impact of the First Circuit decision on the maritime industry.

The heavy reliance placed by Ellenwood on *Colorado Anti-Discrimination Comm'n v. Continental Airlines*, 372 U.S. 714 (1963), underscores his misunderstanding of the chaotic effect application of state handicap discrimination laws will have here. In *Continental Airlines* the Court held that a Colorado race discrimination statute would not place an unconstitutional burden on interstate commerce.[2] The Court correctly found that in the area of racial discrimination (in sharp contrast to handicap discrimination) "the threat of diverse and conflicting regulation is virtually non-existent." *Id.* at 721. Should the First Circuit decision stand, maritime employers will inevitably face the diverse and conflicting regulation that maritime law seeks to avoid.

B. In the Absence of a Substantial Single State Interest, Supreme Court Precedent Prohibits Disruption of Maritime Uniformity

Most of the discussion of cases by the respondents on the principles governing state law supplementation of maritime law is unobjectionable save for one fatal infirmity. Respondents fail to note that this Court will not permit substantial disruptions of admiralty's uniformity by application of a state law unless that state has a localized

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[2] The commerce clause has never demanded the same degree of harmony and uniformity that has been the hallmark of maritime law. *Compare Sproles v. Binford*, 286 U.S. 374 (1931) *with Southern Pacific Co. v. Jenson*, 244 U.S. 205 (1917).

and important interest in the application of its law. The First Circuit's adoption into maritime law of disparate state handicap discrimination laws, when no single state has a local interest to be served, has no support in the precedents of the Court.

There is no disagreement that maritime law has room to accommodate state law. But it is also undisputed "that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system." *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 373 (1958). The wooden application of state law advanced here by respondents—and adopted by the First Circuit—ignores "the highly intricate interplay of the States and the National Government in their regulation of maritime commerce." *Id.* In each case discussed by the respondents, this Court identified localized state interests before permitting application of a state law to a situation that would disrupt admiralty's uniformity. It is not enough to say that states generally have an interest in the subject of employment discrimination. *See* Ellenwood Br. at 14. For a state law to intrude into admiralty's harmony, a specific state must have a significant and important localized interest in the conduct being regulated. *See, e.g., Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980) (holding that Pennsylvania's workers compensation law may be applied in case of *land-based* injury) (*see* Ellenwood Br. at 16); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 343 (1973) (holding that Florida's shoreline oil spill clean-up requirements may be applied in a case involving "sea-to-shore pollution" on Florida's coast) (*see* State Br. at 11-12); *Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1961) (refusing to apply New York's statute of frauds where the contract at issue was not one "peculiarly a matter of state law and local concerns") (*see* Ellenwood Br. at 13). Where there is no localized single state interest, there is no place in admiralty for application of a particular state's law.

II. THERE IS A MATERIAL SPLIT BETWEEN THE ELEVENTH CIRCUIT AND THE FIRST CIRCUIT ON THE PREEMPTIVE EFFECT OF SECTION 503 OF THE REHABILITATION ACT

Both Ellenwood and the State misconstrue the conflict between the decision of the First Circuit and the decision of the Eleventh Circuit in *Howard v. Uniroyal, Inc., supra.* Here, the First Circuit interpreted the Congressional intent underlying section 503 of the Rehabilitation Act and concluded that Congress was unconcerned over consistency in the standards of conduct for federal contractors. 984 F.2d at 1270. As a consequence, the First Circuit found no federal preemption of Ellenwood's state handicap discrimination or state contract claims. In sharp conflict was the Eleventh Circuit's finding that Congress intended a uniform rule of conduct for federal contractors. As a consequence of *that* interpretation, the *Howard* court held that Congress preempted state contract claims based on the same conduct regulated by section 503. *Howard*, 719 F.2d at 1561.

Neither Exxon Shipping nor the district court contended that there is a complete identity of *claims* between *Howard* and this case. Preemption of state claims is determined by analysis of the conduct regulated by federal law, not by reference to the legal theories advanced to attack such conduct. *See Peterson v. Air Line Pilots Ass'n, Int'l,* 759 F.2d 1161, 1168 (4th Cir.), *cert. denied,* 474 U.S. 946 (1985), *citing San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 244-45 (1959). The conduct at issue underlying Ellenwood's claims based on statute (unlike *Howard*) and contract (like *Howard*) is the identical conduct underlying Ellenwood's claim filed with the federal government under section 503 of the Rehabilitation Act. That this action is based on "unrelated causes of action," Ellenwood Br. at 6, is arguable. That this action is based on the identical conduct regulated by section 503 is not .

Either section 503 is preemptive of state claims based on conduct regulated by the Rehabilitation Act or it is not. On that point, the First Circuit and the Eleventh Circuit are in conflict. This is an issue of significant importance to federal contractors nation-wide. The Court should resolve that conflict.

III. ELLENWOOD'S CONTRACT CLAIMS WERE BASED ON EXXON SHIPPING'S EMPLOYEE SUBSTANCE ABUSE POLICY

Ellenwood grossly distorts the basis of his contract claims which, at trial, were unquestionably based on Exxon Shipping's employee substance abuse policies.[3] Transparently, Ellenwood seeks to avoid review by the Court of the First Circuit's first impression ruling permitting a maritime at-will employee to infer an employment contract from an employee policy statement. That important question of law should not be lost by Ellenwood's recasting of his contract claims.

In his opening statement, *see* Tr. Vol. I at 29-47, and his closing statement, *see* Tr. Vol. XI at 76-77, Ellenwood referred solely to Exxon Shipping's substance abuse policy as a basis for his contract claims. The district court's jury instruction could not be clearer:

> "Contract. The first claim is pursued by Mr. Ellenwood alone. He claims that Exxon Shipping entered into a contract with him that it would not relieve him of his duties as a chief engineer for seeking alcohol rehabilitation . . .
>
> "The language focused on by the parties is that contained in the various Exxon Shipping policy provi-

[3] There was some dispute at trial whether a 1987 or a 1984 substance abuse policy was in effect during 1988 when Ellenwood was hospitalized for alcohol abuse. That dispute is immaterial here: in either case, Ellenwood's contract claims were based on Exxon Shipping's substance abuse policy. Both the district court and the First Circuit were well aware of this. *See* A.3, A.21, A.28.

sions concerning employee use of alcohol and rehabilitation."

Tr. Vol. XI at 43-44. Diversionary assertions by Ellenwood should not distract the Court from reviewing the First Circuit's recognition of an implied maritime employment contract based on an employee policy statement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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